ORIGINAL

IN THE ILLINOIS COMMERCE COMMISSION
527 East Capitol Avenue
Springfield, IL 62701

United Transportation Union –
Illinois Legislative Board,

Petitioner,

v.

Canadian Pacific Railway,

Respondent.

Case No. T04-0082

RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO MOTION TO DISMISS

INTRODUCTION

CP Rail has moved to dismiss the Complaint of the United Transportation Union—Illinois Legislative Board ("UTU") because: 1) the dispute is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), which expressly preempts, *inter alia,* states' rights to regulate railroads' "construction" of new "facilities"; 2) the dispute constitutes a minor dispute and therefore is preempted by the Railway Labor Act ("RLA"); and 3) any past complaints of the UTU have been remedied or eliminated and are therefore moot. As CP Rail noted in its initial memorandum, and as the UTU establishes in its own brief, the Complaint should be dismissed for the additional reason that the state regulations under which the UTU has sued are preempted by the Federal Railway Safety Act ('FRSA"). Accordingly, the Complaint should be dismissed based on any one or all of these asserted grounds.

I. THE UTU'S ARGUMENT THAT THIS DISPUTE IS PREEMPTED BY THE FEDERAL RAILWAY SAFETY ACT IS ANOTHER GROUND FOR DISMISSAL OF THE COMPLAINT.

In its Response to CP Rail's Motion, the UTU surprisingly argues that another federal statute, the Federal Railway Safety Act ("FRSA"), and not the ICCTA or the RLA, preempts the field involving railroad worker restroom and washing facilities. As demonstrated below, and as CP Rail noted in its initial motion, the claims asserted by the UTU in this case are also preempted under the FRSA.[1]

In order to achieve national uniformity of railroad regulation, Congress included an express preemption clause in the FRSA which provides that:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue enforce a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement. A state may adopt or continue enforce an additional or more stringent law, regulation or order related to railroad safety when the law, regulation or order (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonable burden interstate commerce.

49 U.S.C. § 20106. Interpreting this provision, the United States Supreme Court and other courts since then have consistently held that when the FRA prescribes a regulation or issues an order covering the subject matter of a state law, claims based upon such state law are preempted and states are prohibited from enforcing such state law. CSX Transportation Inc. v. Easterwood, 507 U.S. 658 (1993); State of Wisconsin v. Wisconsin Cent. Transp. Corp., 546 N.W.2d 206, 211 (Wis. Ct. App. 1996) (state "conductor law" substantially subsumed by federal regulation dealing with locomotive engineers and therefore, state statute was preempted by the FRSA); CSX Transp., Inc. v.

[1] The UTU completely misconstrues CP Rail's ICCTA preemption argument. CP Rail is not claiming that the ICCTA preempts the FRSA or its safety regulations. To the contrary, as CP Rail stated in its initial brief and as demonstrated above, the FRSA also preempts the state regulations at issue in this case and therefore provides an additional basis for the Commission to dismiss the Complaint. See Respondent's Motion to Dismiss at n. 2, p.7.

City of Plymouth, 283 F.3d 812, 817 (6th Cir. 2002) (holding state statute relating to grade crossings preempted by FRSA where federal regulations covered the subject matter of the state statute). Indeed, the UTU admits that where the FRA has regulated in an area, the issue is federally preempted under the FRSA and claims under state regulations are preempted. That is precisely the case here.

In this case, the FRSA preempts the state regulations under which the UTU has sued because, contrary to the UTU's claim, the FRA has specifically regulated in the field which is the subject matter of the UTU's Complaint, restroom and wash facilities for train crews. Specifically, the FRA has regulated the field of when, where and how restroom/washroom facilities must be provided for train crews. See 49 CFR 229.137 (attached hereto as Exhibit A). This federal regulation, 49 CFR 229.137, entitled Safety Requirements Cabs and Cab Equipment, Sanitation Compartment, specifically and in excruciating detail, describes the FRA's requirements for locomotive toilet and wash equipment in locomotives.[2] Id. Accordingly, because the FRA has prescribed regulations covering the subject matter of the state regulations relied upon by the UTU, the state regulations are preempted by the FRSA and this tribunal lacks jurisdiction to hear such claims. Easterwood, 507 U.S. 658.

[2] Under the regulation, the FRA requires locomotive toilet facilities only where other stationary toilet and wash facilities are not available. 49 CFR 229.137. CP Rail's Motion demonstrates that it has met and exceeded such FRA regulations in the present case. (see Affidavit of Debbie Balthasar attached as Exhibit B to CP's Motion). Soo Line has not only provided toilet and wash facilities to the West Yard UTU crews in the locomotives, it has provided stationary facilities within a one mile locomotive ride or a two mile automobile ride of the West Yard. Therefore, applying the language of 49 CFR 229.137, the UTU members in the West Yard have both "ready access to railroad-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift" and locomotives "equipped with a sanitation compartment" complying with FRA standards. The FRA regulation requires only one or the other.

II. ICCTA PREEMPTS REGULATION OF CONSTRUCTION OF RAILROAD FACILITIES, NOT MERELY "ECONOMIC" REGULATION OF RAILROADS

The state regulations at issue in this case are also preempted by the ICCTA. In its Response, the UTU completely mischaracterizes federal law concerning the ICCTA, which, among many other things, broadly and expressly preempts a state's right to regulate a railroad's "construction," "operation," "abandonment," or "discontinuance" of its facilities. The UTU ignores the plain and broad language of the ICCTA. Instead, the UTU argues, without authority, that the Surface Transportation Board ("STB"), created by the ICCTA, 49 U.S.C. § 10102(9) et. seq., has exclusive jurisdiction only as to "economic" regulation of railroads, and does not have jurisdiction over regulation of construction of new "facilities", such as the new restroom, shower and lunch room facilities that the UTU here seeks to force CP Rail to build in the middle its Bensenville West Yard.

The UTU's argument, that ICCTA preemption should be narrowly applied only to "economic" issues, has been specifically rejected by federal appellate courts that have considered the issue. Each court has confirmed the broad, general and expansive preemption of railroad affairs intended by Congress through the ICCTA. As explained by the Ninth Circuit in City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998), and echoed by the Sixth Circuit in Railroad Ventures, Inc. v. Surface Transportation Board, 299 F.3d 523 (6th Cir. 2002):

> Section 10501 of the ICCTA, which governs the STB's jurisdiction, states the Board will have exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(2) (1997). The same section states that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b) (1997). . . . The section unambiguously states: "The authority of the Board under this subchapter is exclusive." Id.
> 154 F.3d at 1030 (emphasis in original).

In City of Auburn, the Ninth Circuit, endorsed a "broad reading of Congress' preemption intent, not a narrow one," specifically rejecting the City's argument (which is the Union's argument

here) that Congress, through the ICCTA, only intended preemption of economic regulation of the railroads. Finding that Congressional intent was clear and that preemption of rail activity is a valid exercise of Congressional power under the Commerce Clause, the Ninth Circuit affirmed the STB's finding that state and local laws were preempted pursuant to § 10501(b)(2).

The Fifth Circuit has also found preemption under 49 U.S.C. § 10501(b). In Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir. 2001), the Fifth Circuit ruled that suits against the railroad (KCS) for negligence were preempted by federal law under 49 U.S.C. § 10501(b). In that case, the plaintiffs, who operated a landscape nursery, alleged that they lost business and eventually were forced to close their business because their customers were required to endure long delays in getting to their nursery when the primary access road was blocked by waiting trains. Finding that "the language of the statute could not be more precise, and it is beyond peradventure that regulation of KCS trains operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise," the Fifth Circuit in Friberg held that the plaintiffs' common claims of negligence were preempted by the ICCTA. 267 F.3d at 443-44. Likewise, in Railroad Ventures, Inc. v. Surface Transportation Board, the Sixth Circuit held that it is manifestly clear that Congress intended to preempt state statutes, and any claims arising there from, to the extent that they intrude upon the STB's exclusive jurisdiction over "the construction... of... facilities..." 49 U.S.C. § 10501(b). 299 F.3d 523 at 563, 564 (6th Cir. 2002).

At bottom, the express language of these cases and numerous state courts considering the issue confirm that Petitioner's claims that "ICCTA and the Surface Transportation Board ('STB') created thereby only pertain to economic regulation" are patently false and reflect a serious misunderstanding of the ICCTA and subsequent case law. The claims asserted by the UTU fall

squarely within the preemption clause of the ICCTA and therefore are federally preempted under this statute.

III. ALL FACILITY LOCATION ISSUES WERE ADRESSED IN THE COLLECTIVE BARGAINING AGREEMENT AND DISPUTES ARE PRE-EMPTED UNDER THE RAILWAY LABOR ACT

The parties have already addressed and agreed upon the issues in this dispute in the Collective Bargaining Agreement ("CBA") (see Exhibit A CP's Motion to Dismiss, General Labor Agreement, Article 40 - Welfare-Locker Room Facilities). The Union expressly agrees in its Response: (1) that the Yard office, where all UTU members go on and off duty at the Bensenville Yard, provides full lunch, shower, locker room, toilet and wash facilities pursuant to the agreement, (2) that the Union specifically bargained in its the agreement for such "Welfare-Locker Facilities" to be located only where its members go on and off duty (not the West Yard), and (3) that the construction and condition of the bargained for facilities comply with the provisions of the State Administrative Code.

The Union now claims that the bargained-for facilities, being located one mile from where some of the UTU members work, are not "convenient," even though it admits that the location of "washroom," "locker room" and "lunch room' facilities is "mentioned in the CBA." This is a classic "minor" dispute, preempted under the Railway Labor Act and outside the jurisdiction of this Illinois Commerce Commission. Monroe v. Missouri Pacific Railroad Co., 115 F.3d 514, 516 (7th Cir. 1997); Brown v. Illinois Cent. R.R. Co., 254 F.3d 654, 658 (7th Cir. 2001); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, at 252-54 (1994); Calvert v. Trans World Airlines, 959 F.2d 698, 699-700 (8th Cir. 1992); Leu v. Norfolk & Western R.R. Co., 820 F.2d 825 (7th Cir. 1987). The UTU's Complaint should therefore be dismissed for lack of jurisdiction.

IV. THE UTU'S COMPLAINT FAILS TO STATE A CLAIM AS A MATTER OF LAW

Finally, the UTU's substantive claims lack merit and should be denied as a matter of law, since the UTU has not alleged any facts which would support a violation of the Illinois regulations it claims have been violated. 92 Ill. Adm. Code §§ 1545.110 and 1545.120 do not require the kinds of facilities the UTU argues must be provided. The UTU - which is attempting to use the Illinois Commerce Commission to accomplish what it could not accomplish through the collective bargaining process - has failed to state any claim under these regulations and the Complaint should be dismissed.

CONCLUSION

For all the foregoing reasons, CP Rail respectfully requests that the Commission grant its Motion to Dismiss and dismiss the UTU's Complaint in its entirety.

Dated: March 7, 2005

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